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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

AARON SCOTT McCLINTON,

Defendant and Appellant.

D056852

(Super. Ct. No. SCD217947)

APPEAL from a judgment of the Superior Court of San Diego County, Bernard E. Revak, Judge. Affirmed as modified with instructions.

In a bench trial, the court found Aaron Scott McClinton guilty of attempted voluntary manslaughter (Pen. Code,¹ §§ 192, subd. (a), 664) (count 1); two counts of assault with a firearm (§ 245, subd. (a)(2)); child abuse (§ 273a, subd. (a)); inflicting corporal injury on a spouse (§ 273.5, subd. (a)); and being a felon in possession of a firearm (§ 12021, subd. (a)(1)). The trial court also made true findings on firearm

¹ Unless otherwise specified, all further statutory references are to the Penal Code.

sentencing enhancements (§§ 12022.5, subd. (a), 12022, subd. (a)(1)) and found the personal use of a deadly weapon (§ 1192.7, subd. (c)(23)). After finding that McClinton had one prior serious felony conviction within the meaning of section 667, subdivision (a)(1) and one prior strike conviction within the meaning of sections 667, subdivisions (b) through (i) and 1170.12, the trial court sentenced McClinton to prison for 34 years four months.

McClinton contends that the firearm enhancement the trial court imposed in count 1, based on section 12022.5, subdivision (a), was improper because (1) that enhancement was not alleged in the information; (2) the trial court did not make a true finding on the firearm enhancement on count 1 at trial, and instead attempted to correct its omission two days after trial at an ex parte hearing; and (3) McClinton was not present at the ex parte hearing. McClinton also contends that the trial court abused its discretion by denying his motion to strike one of his prior strikes. We conclude that (1) the trial court acted improperly in imposing the sentence enhancement under section 12022.5 on count 1 because it declined to make a true finding on the enhancement at trial and could not correct its judicial error at an ex parte hearing two days after trial; and (2) the trial court was within its discretion to deny the motion to strike the prior strike. We therefore order that the 10-year sentence enhancement imposed for the firearm use allegation in count 1 be stricken, and in all other respects we affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

On the evening of November 6, 2008, McClinton was arguing with his wife Monica in their small bedroom in an apartment they shared with their infant son, Monica's 10-year-old son, their roommate Elisha Strickland and Strickland's son. Their infant was on the bed. The argument became physical, with McClinton and Monica hitting each other and Monica throwing things at McClinton. McClinton pulled a gun and shot it near Monica's head. The bullet entered the wall above the bed. McClinton exited the bedroom and encountered Strickland, who had run toward the bedroom when she heard the gunshot. McClinton pointed the gun at Strickland and said, "Are you playing games?" McClinton then fled the apartment. As a result of the incident, Monica had a discolored bump on her jaw and abrasions on her face and chest.

An amended information charged McClinton with attempted murder (§§ 187, subd. (a), 664) (count 1); assault with a firearm on Monica (§ 245, subd. (a)(2)) (count 2); assault with a firearm on Strickland (§ 245, subd. (a)(2)) (count 4); child abuse (§ 273a, subd. (a)) (count 3); inflicting corporal injury on a spouse (§ 273.5, subd. (a)) (count 5); and being a felon in possession of a firearm (§ 12021, subd. (a)(1)) (count 6).

As particularly relevant to the issues presented in this appeal, the amended information included weapon enhancements, each pled under a different code section. The attempted murder count alleged a firearm enhancement pursuant to section 12022.53, subdivision (b). The assault with a firearm count relating to Monica alleged a firearm enhancement pursuant to section 12022.5, subdivision (a). The child abuse count alleged

the personal use of a deadly weapon pursuant to section 1192.7, subdivision (c)(23) and that McClinton was armed with a firearm pursuant to section 12022, subdivision (a)(1). The amended information also alleged two serious felony priors (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)) and two prior strikes (§§ 667, subds. (b)-(i), 668, 1170.12).

McClinton waived his right to a jury trial, and the trial court found McClinton guilty on all counts except for the attempted murder count, on which the trial court convicted McClinton of the lesser included offense of attempted voluntary manslaughter (§§ 192, subd. (a), 664). The trial court made true findings on each of the weapons enhancements except for the enhancement attached to the attempted murder count, observing that the enhancement was pled under section 12022.53, subdivision (b), which applies to an attempted murder conviction but not to a conviction for the lesser included offense of attempted voluntary manslaughter. Two days later, on November 19, 2009, the trial court held an unreported ex parte hearing regarding the enhancement alleged for count 1, at which McClinton was not present. The minute order issued after the ex parte hearing stated that the trial court had "correct[ed] the record" with respect to the weapons enhancement attached to McClinton's attempted voluntary manslaughter conviction by making a true finding under section 12022.5, subdivision (a), which — unlike section 12022.53, subdivision (b) — applies to attempted voluntary manslaughter.²

² Section 12022.5, subdivision (a) provides that, with certain exceptions, "any person who personally uses a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years, unless use of a firearm is an element of that offense."

At the sentencing hearing, the trial court struck one of the prior strikes on the ground that it was an out-of-state conviction that did not qualify as a prior strike. The trial court denied McClinton's motion to strike the second strike, which was a robbery committed when he was 16 years old. The trial court imposed a prison sentence of 34 years four months, which included a 10-year firearm use sentence enhancement on count 1, pursuant to section 12022.5, subdivision (a), based on the true finding on that enhancement as reflected in the November 19, 2009 minute order from the ex parte hearing.

II

DISCUSSION

A. *McClinton's Challenges to the Imposition of the Firearm Enhancement on Count 1 Were Not Forfeited*

McClinton advances several arguments in support of his contention that the trial court erred in imposing a firearm enhancement under section 12022.5, subdivision (a) on count 1. First, he argues that the enhancement could not be imposed because it was not pled in the information. Second, he argues that the trial court impermissibly made a true finding on the enhancement two days after the end of the bench trial. Third, McClinton argues that the trial court erred in making a true finding on the enhancement during a hearing at which he was not present.

Before we discuss these contentions, we consider whether, as the Attorney General argues, McClinton has forfeited his appellate arguments by not raising an objection in the trial court to imposition of the firearm enhancement on count 1.

We conclude that none of McClinton's assignments of error have been forfeited. McClinton's first and second contentions are that the firearm enhancement imposed in count 1 was not properly pled and proved because (1) it was not included in the information; and (2) it was not included in the trial court's findings after the bench trial. In *People v. Mancebo* (2002) 27 Cal.4th 735 (*Mancebo*), our Supreme Court decided that the appellant had not forfeited his right to argue that the trial court improperly imposed a sentencing enhancement under the one strike law (§ 667.61) that had not be pled or proven. (*Mancebo*, at p. 749, fn. 7.) *Mancebo* explained that because the appellant's claim was that the trial court did not have the discretion to impose a sentencing enhancement that was not pled and not proven, the appeal fell into the narrow exception to forfeiture for "'legal error resulting in an unauthorized sentence [that] commonly occurs where the court violates mandatory provisions governing the length of confinement.'" (*Ibid.*) As McClinton contends that the sentence enhancement on count 1 was not pled and that a finding was not made on that enhancement at trial, the principle expressed *Mancebo* applies here.

The Attorney General cites no authority in support of its argument that McClinton has forfeited his appellate argument that the trial court erroneously held the November 19, 2009 ex parte hearing in his absence. We are aware of no case law holding that defendant forfeits the right to complain of a violation of the right to be present at trial merely by failing to raise the issue below. On the contrary, case law establishes that "[a] defendant may waive his or her constitutional right to be present during a critical stage, *provided the waiver is knowing, intelligent, and voluntary.*"

(*People v. Rundle* (2008) 43 Cal.4th 76, 133-134, italics added.) Further, section 977, subdivision (b), requires a written waiver by the defendant of the right to be present. A rule permitting forfeiture due to appellant's silence at trial on the issue of his right to be present would be inconsistent with the authorities requiring a defendant's affirmative waiver of his right to be present. (See *People v. Marks* (2007) 152 Cal.App.4th 1325, 1334, fn. 3 [rejecting the argument that the defendant forfeited his right to appellate review of whether he was deprived of the right to be present at trial by not making a timely objection below because "there is absolutely no evidence in the record of a knowing and intelligent waiver of his right to be present"].) The record does not disclose a waiver by McClinton of his presence at the November 19, 2009 ex parte hearing.

We therefore conclude that McClinton has not forfeited his appellate arguments, and we proceed to consider them.

1. *The Trial Court's True Finding on a Firearm Enhancement Not Pled in the Information Did Not Violate McClinton's Right to Due Process*

We first consider whether, as McClinton contends, the trial court violated his right to due process by imposing a firearm enhancement on count 1 under section 12022.5, subdivision (a) when that specific enhancement was not charged in the information.

As we have explained, the operative information charged McClinton in count 1 with attempted murder and alleged a firearm enhancement under section 12022.53, subdivision (b). That enhancement applies when a defendant personally uses a firearm during an attempted murder or other specified felonies, but does not apply to use of a

firearm during attempted manslaughter.³ Section 12022.5, subdivision (a), on the other hand, is broader, applying to a defendant who personally uses a firearm during the commission of any felony or attempted felony. At the November 19, 2009 ex parte hearing, held two days after trial, the trial court apparently interlineated the amended information to include an allegation of a firearm enhancement under section 12022.5, subdivision (a),⁴ and "correct[ed]" its findings to include a true finding on that enhancement on count 1. At sentencing, the trial court imposed a 10-year enhancement based on the true finding on the firearm enhancement made pursuant to section 12022.5, subdivision (a)(1) on count 1.

As a general matter, "a defendant has a cognizable due process right to fair notice of the specific sentence enhancement allegations that will be invoked to increase punishment for his crimes." (*Mancebo, supra*, 27 Cal.4th at p. 747.) McClinton relies on this principle and cites authorities concluding that, in the particular cases presented, due process guarantees prevented the defendant from being sentenced for enhancements that were not pled. (*People v. Hernandez* (1988) 46 Cal.3d 194, 197, 208 [as a matter of due

³ Section 12022.53, subdivision (b) provides: "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), personally uses a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years. The firearm need not be operable or loaded for this enhancement to apply." Section 12022.53, subdivision (a) specifies several felonies, including attempted murder, but does not specify attempted manslaughter.

⁴ Although the source of the interlineation is not clear from the record, both the Attorney General and McClinton believe that the interlineation was made during the ex parte hearing held on November 19, 2009.

process, a sentencing enhancement under § 667.8 for kidnapping for the purpose of rape was not permissible when not pled in the information]; *People v. Haskin* (1992) 4 Cal.App.4th 1434, 1439 [defendant charged with an enhancement under § 667.5, subd. (b), which applies to "'each prior separate prison term served for any felony,'" could not be sentenced under § 667, which applies to "each prior 'serious felony'"]; *People v. Henderson* (1972) 26 Cal.App.3d 232, 238 [under principles of due process, defendant could not be sentenced based on an enhancement for use of a firearm during a robbery when the information alleged an enhancement only based on the fact that he was armed with a deadly weapon].)

However, McClinton does not cite *People v. Strickland* (1974) 11 Cal.3d 946 (*Strickland*), which is the controlling case. In *Strickland*, the defendant was charged with murder but was convicted of the lesser included offense of voluntary manslaughter. (*Id.* at p. 951.) The trial court imposed a sentence enhancement under the version of section 12022.5 in existence at the time, which applied to the use of a firearm in the commission of a limited number of crimes, including murder but not manslaughter. (*Strickland*, at pp. 959-960.) Our Supreme Court concluded that the enhancement in section 12022.5 did not apply, but that the defendant should have been sentenced based on the enhancement in section 12022, which, as it existed at the time, applied to "'[a]ny person who commits or attempts to commit any felony . . . while armed with any of the [specified] deadly weapons . . .'" (*Strickland*, at p. 961, fn. 3.)

Quoting with approval from *People v. Provencher* (1973) 33 Cal.App.3d 546, 549-550, *Strickland* explained, "[S]ection 12022.5 and section 12022 . . . do not define a

crime or offense but relate to the penalty to be imposed under certain circumstances. Thus section 12022 is not a lesser included offense under 12022.5 but section 12022 would be applicable in any case in which 12022.5 applies. Basically 12022.5 is a limited application of section 12022 with a heavier penalty. In the present case appellant did not come within the provisions of section 12022.5, as the crime of which he was convicted was not specified in that section, but the jury did find that he used and thus was armed with a firearm, a shotgun, at the time the offense was committed. Appellant was charged in the commission with the use of a firearm under section 12022.5, thus had notice that his conduct [could] also be in violation of section 12022.'" (*Strickland, supra*, 11 Cal.3d at p. 961.) Our Supreme Court in *Strickland* therefore ordered that the defendant's sentence be modified to delete the punishment under the inapplicable section 12022.5 and add the punishment under section 12022. (*Strickland*, at p. 962.)

Here, applying the reasoning of *Strickland*, McClinton was on notice that his conduct could violate section 12022.5, subdivision (a) because that provision would apply in any case where section 12022.53, subdivision (b) applies. The elements of sections 12022.5, subdivision (a) and 12022.53, subdivision (b) are identical. The sole difference between the two enhancements is that section 12022.5, subdivision (a) applies to the use of a firearm in the commission of any felony, while section 12022.53, subdivision (b) applies only to the use of a firearm during a felony specified in section 12022.53, subdivision (a). Therefore, by alleging an enhancement under section 12022.53, subdivision (b), the information placed McClinton on notice that his conduct was subject to the broader scope of section 12022.5, subdivision (a), and principles of

due process do not prevent the imposition of a sentence enhancement under section 12022.5, subdivision (a) for count 1.

This conclusion is consistent with the maxim that "a valid accusatory pleading need not specify by number the statute under which the accused is being charged" and that "'the specific allegations of the accusatory pleading, rather than the statutory definitions of offenses charged, constitute the measuring unit for determining what offenses are included in a charge.'" (*People v. Thomas* (1987) 43 Cal.3d 818, 826 [although the information cited the statute describing voluntary manslaughter, defendant's conviction for involuntary manslaughter did not violate his due process right to notice of the charges against him when the information described a general charge of manslaughter].) Even though the information specifically alleged with respect to count 1 that McClinton "personally used a firearm, to wit a handgun, *within the meaning of* . . . [section] 12022.53, [subdivision (b)]" (italics added), the facts alleged (i.e., personal use of a firearm) also supported an enhancement under section 12022.5, subdivision (a) and thus avoided a due process violation when McClinton was sentenced in count 1 under section 12022.5, subdivision (a).

Additionally, *People v. Riva* (2003) 112 Cal.App.4th 981 (*Riva*) supports our conclusion that McClinton received constitutionally sufficient notice that he could be sentenced on count 1 pursuant to section 12022.5, subdivision (a). In *Riva*, the information alleged a firearm enhancement pursuant to section 12022.53, subdivision (d) as to the attempted voluntary manslaughter and assault with a firearm counts, but it did not allege that enhancement with respect to the count charging the defendant with

shooting at an occupied motor vehicle.⁵ (*Riva, supra*, 112 Cal.App.4th at p. 1000.) All three charges arose from the same act of shooting a gun at a car. (*Id.* at p. 986.) Even though the enhancement under section 12022.53, subdivision (d) was pled only as to two of the three counts, the jury was asked to make a true finding with respect to the enhancement on all three counts, and at sentencing the court imposed an enhancement under section 12022.53, subdivision (d) in connection with the conviction for shooting at an occupied motor vehicle, even though the enhancement was not alleged for that count.

Riva concluded that imposing the section 12022.53 enhancement in connection with the count on which it was not alleged did not violate the defendant's right to due process of law. *Riva* explained, "Failure to plead the section 12022.53 enhancement as to the count alleging [the defendant] shot at an occupied vehicle did not interfere with [the defendant's] ability to contest the factual bases of the enhancement. [The defendant] was on notice he had to defend against the allegation under section 12022.53, subdivision (d), a principal personally and intentionally discharged a firearm which proximately caused great bodily injury, because this allegation was pled as to the manslaughter and assault counts and those counts went to trial." (*Riva, supra*, 112 Cal.App.4th at pp. 1002-1003.)

We reach the same conclusion here. Because the information alleged an enhancement under section 12022.5, subdivision (a) with respect to count 2's charge of assault with a firearm, and count 2 arose out of the same conduct giving rise to the

⁵ The enhancement in section 12022.53, subdivision (d) applies to a person who personally and intentionally discharges a firearm and causes great bodily injury or death in connection with certain felonies.

attempted murder charge in count 1, McClinton's due process rights were not violated when an enhancement under section 12022.5, subdivision (a) was applied to count 1.

2. *The Trial Court Improperly Attempted to Correct Its Verdict at the Ex Parte Hearing by Making a True Finding on the Firearm Enhancement in Count 1*

We next consider McClinton's contention that the trial court acted outside its authority by issuing the minute order from the November 19, 2009 ex parte hearing, stating that the "court corrects the record" to make a true finding on a section 12022.5, subdivision (a) firearm enhancement on count 1.

Section 1167 governs the trial court's findings of fact following a bench trial. Pursuant to section 1167, "[w]hen a jury trial is waived, the judge or justice before whom the trial is had shall, at the conclusion thereof, announce his findings upon the issues of fact, which shall be in substantially the form prescribed for the general verdict of a jury and shall be entered upon the minutes." Because section 1167 states that the trial court "shall" announce findings "at the conclusion" of trial, the general rule established thereby is that "the court must make factual findings at the 'conclusion' of a nonjury trial." (*People v. Flores* (1974) 12 Cal.3d 85, 94.) "[A] trial court cannot make findings required at trial, at a later time." (*People v. Williamson* (1979) 90 Cal.App.3d 164, 170; see also *People v. Jackson* (1987) 193 Cal.App.3d 393, 404 (*Jackson*) [pursuant to

§ 1167, the trial judge was required to make a finding on a sentencing enhancement at the time of trial].)⁶

Applying this principle, cases have concluded that a trial court is without authority to amend or supplement its findings after a bench trial has concluded and the findings are entered in the minutes. (*People v. Parks* (2004) 118 Cal.App.4th 1, 9 [the trial court lacked jurisdiction to modify its findings one month after trial to reflect a conviction of attempted voluntary manslaughter as a lesser included offense of attempted murder, instead of its original finding of assault with a firearm]; *People v. Ferrara* (1988) 202 Cal.App.3d 201, 208, 209 [one month after trial, the trial court improperly revised its express finding as to whether the light was red when the defendant entered the intersection]; *Jackson, supra*, 193 Cal.App.3d at p. 404 [in the absence of an agreement by the defendant, the court could not make a finding on an enhancement during sentencing after failing to do so at trial].)

Therefore, based on the authorities cited above, the trial court in this instance was required to (1) make a true finding on the firearm allegation attached to count 1 at the conclusion of trial and (2) enter that finding in the minutes. It did not have the authority

⁶ The practice of making findings on firearm sentencing enhancements at the conclusion of a bench trial is consistent with the practice in jury trials, in which the jury is required to make separate specific findings on the firearm enhancements as to each applicable count. (§ 1158a, subd. (b) ["Whenever the fact that a defendant used a firearm is charged . . . in any count of the . . . information to which the defendant has entered a plea of not guilty, the jury if they find a verdict of guilty of the offense with which the defendant is charged must also find whether or not the defendant used a firearm as charged in the count to which the plea of not guilty was entered."].)

to make a finding at a later time. (*Jackson, supra*, 193 Cal.App.3d at p. 404 [after a bench trial, the trial court could not make a true finding on a sentencing enhancement for the first time during sentencing].)

In urging us to conclude that the trial court acted properly, the Attorney General cites *People v. Chambers* (2002) 104 Cal.App.4th 1047. We find *Chambers* to be inapplicable and unpersuasive here. In *Chambers*, the trial court was silent as to its finding on the charged firearm enhancement in its oral findings following the bench trial and did not include a finding on the enhancement in the minute order setting forth its findings. (*Id.* at p. 1049.) Nevertheless, at sentencing the trial court imposed a sentence on the firearm enhancement. (*Ibid.*) The defendant appealed, contending that the imposition of the firearm enhancement was improper because the record did not reflect a true finding on it. (*Id.* at p. 1050.) *Chambers* rejected this argument, holding that it would *imply* a true finding on the enhancement based on the fact that the trial court imposed sentence on the enhancement. (*Id.* at p. 1051.) Here, in contrast, the record does not allow us to *imply* that the trial court made a true finding on the firearm enhancement at the conclusion of the bench trial in conformance with section 1167. On the contrary, the reporter's transcript shows that the trial court *rejected* the firearm enhancement on count 1 on the ground that section 12022.53 did not apply to a conviction for attempted voluntary manslaughter, and thus declined to make a finding on the firearm enhancement on count 1. The trial court's attempt to belatedly make that finding at the ex parte hearing two days later underscores that the finding was not made at trial. Accordingly, *Chambers* is simply inapplicable here because the trial court clearly

declined to make a finding on the firearm enhancement at the conclusion of trial. Unlike in *Chambers*, no contrary implication is possible.

We acknowledge that, in proper circumstances, a trial court may correct clerical errors appearing in a minute order that contains findings following a bench trial. (*Bell v. Farmers Ins. Exchange* (2006) 135 Cal.App.4th 1138, 1144 ["It is elementary that '[a] court can always correct a clerical, as distinguished from a judicial error which appears on the face of a decree by a *nunc pro tunc* order.'"]; *In re Candelario* (1970) 3 Cal.3d 702, 705 (*Candelario*) ["It is not open to question that a court has the inherent power to correct clerical errors in its records so as to make these records reflect the true facts . . . , " and "[t]he power . . . may be exercised in criminal as well as in civil cases."].) "Clerical error, however, is to be distinguished from judicial error which cannot be corrected by amendment." (*Candelario*, at p. 705.) "If the court misconstrued the evidence before it, or misapplied the law applicable to the facts disclosed by the evidence, or was even misled by counsel, such an error was in no sense a clerical error which could thereafter be corrected by the court upon its own motion" (*Lankton v. Superior Court* (1936) 5 Cal.2d 694, 696.) "Any attempt by a court, under the guise of correcting clerical error, to 'revise its deliberately exercised judicial discretion' is not permitted." (*Candelario*, at p. 705.)

The trial court here may have believed that it was correcting a clerical error, as the minute order from the November 19, 2009 ex parte hearing stated that the "court corrects the record." However, the trial court's actions at the ex parte hearing cannot be characterized as correction of a clerical error rather than an attempt to correct judicial

error. The reporter's transcript of the bench trial shows that the trial court deliberately declined to make a finding on the firearm enhancement on count 1 because it believed that it could not do so due to the fact that it had found McClinton guilty of the lesser included offense of attempted voluntary manslaughter.⁷ Therefore, the purpose of the November 19, 2009 ex parte hearing was to "'revise [the trial court's] deliberately exercised judicial discretion'" (*Candelario, supra*, 3 Cal.3d at p. 705), which it was without authority to do.

We accordingly conclude that the trial court impermissibly issued the November 19, 2009 minute order making a true finding on the firearm enhancement on count 1, and that order is ineffectual to amend the findings that the trial court made pursuant to section 1167 at the close of the bench trial and recorded in the minutes.

A sentence for a firearm enhancement may not be imposed in the absence of a true finding on the enhancement allegation. (*People v. Salas* (2001) 89 Cal.App.4th 1275, 1282 [sentence improperly imposed based on an enhancement for personal use of a firearm when the jury did not make a finding of personal use].) The sentence imposed by the trial court for the firearm enhancement is not based on any true finding properly made

⁷ We note that the trial court's failure to make a finding on the firearm enhancement on count 1 appears to have been caused, at least in part, by the prosecutor's failure to request a finding on that enhancement in light of the trial court's finding of guilt under the lesser included offense of attempted voluntary manslaughter. When the trial court asked the prosecutor whether it was correct that the firearm enhancement on count 1 did not apply in light of the conviction on the lesser included offense, the prosecutor stated, "I don't know" and "I truly don't know." The trial court therefore proceeded to announce its findings without making a true finding on the firearm enhancement on count 1.

by the trial court, and it is therefore unauthorized. We accordingly order the sentence stricken. (See *Jackson, supra*, 193 Cal.App.3d at p. 405 [striking the sentencing enhancement imposed pursuant to a true finding on the enhancement improperly made at sentencing rather than at trial].)⁸

B. *The Trial Court Did Not Abuse Its Discretion in Denying the Motion to Strike McClinton's Remaining Strike*

McClinton's final contention is that the trial court abused its discretion by denying the motion to strike one of McClinton's prior strikes. The prior strike that McClinton sought to have stricken was a robbery he committed when he was 16 years old, during which he kicked a victim until the victim handed over a watch.

At trial, McClinton argued that the strike should be stricken because it was committed when he was 16 years old, and his subsequent convictions (obviously not including the instant offenses) were "devoid of any violence" except for a conviction for resisting an officer in 2001.

The trial court denied the motion to strike the prior without explaining its reasoning,⁹ but it apparently accepted the prosecution's argument that the robbery

⁸ Because we conclude that the trial court's November 19, 2009 order following the ex parte hearing was an improper attempt to correct a judicial error, we need not, and do not, reach McClinton's argument that the trial court improperly held the ex parte hearing without McClinton being present.

⁹ "While a court must explain its reasons for striking a prior . . . , no similar requirement applies when a court declines to strike a prior 'The absence of such a requirement merely reflects the legislative presumption that a court acts properly whenever it sentences a defendant in accordance with the three strikes law.'" (*In re Large* (2007) 41 Cal.4th 538, 550, citations omitted.)

conviction should not be stricken due to the criminal activities that McClinton engaged in from the age of 15. In addition to the robbery at issue, those activities included another robbery involving a firearm, kidnapping, and a domestic violence incident in which McClinton pulled a fake gun on a police officer.

A trial court may strike a finding under the three strikes law that a defendant has previously been convicted of a serious and/or violent felony (i.e., a strike) on its "own motion or upon the application of the prosecuting attorney . . . in furtherance of justice." (§ 1385, subd. (a); *People v. Williams* (1998) 17 Cal.4th 148, 158 (*Williams*), citing *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.) In determining whether to strike a strike, the court "must consider whether, in light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Williams*, at p. 161.)

The trial court's "failure to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard." (*People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony*).) "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary."" (*Id.* at p. 376.) Second, ""[a]n appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge,""" and thus the trial court's ""decision will

not be reversed merely because reasonable people might disagree."" (Id. at p. 377.)

Taken together, these two precepts establish the overarching principle on review that "a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (Ibid.)

We conclude the trial court acted well within its discretion to deny McClinton's motion to strike his prior strike. Because of the nature of McClinton's prior offenses and the instant offenses, which showed a continuing course of criminal conduct throughout McClinton's life, including the use of violence, McClinton was not wholly "outside the scheme's spirit." (Williams, supra, 17 Cal.4th at p. 161.) We cannot conclude that the trial court's refusal to strike McClinton's prior strike was "so irrational or arbitrary that no reasonable person could agree with it." (Carmony, supra, 33 Cal.4th at p. 377.)¹⁰

¹⁰ McClinton makes a cursory and undeveloped argument that the imposition of the three strikes law in this case constituted cruel and unusual punishment and violated his constitutional right to due process. These arguments have been waived because they were not raised below. (People v. Pecci (1999) 72 Cal.App.4th 1500, 1503.)

DISPOSITION

The 10-year sentence imposed on the firearm enhancement on count 1 pursuant to section 12022.5, subdivision (a) is stricken. The trial court is directed to modify the abstract of judgment accordingly and to forward an amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects the judgment is affirmed.

IRION, J.

WE CONCUR:

McCONNELL, P. J.

McINTYRE, J.